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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 JULIE BERG,

10 Plaintiff,

11 v.

12 NANCY A BERRYHILL, Deputy
Commissioner of Social Security for
Operations,

13 Defendant.

CASE NO. 3:17-CV-05611-DWC

ORDER ON MOTION FOR
ATTORNEY'S FEES

14 Plaintiff Julie Berg filed a Motion for Attorney Fees ("Motion for Fees"), seeking
15 attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"). Dkt. 18.
16 Specifically, Plaintiff seeks attorney's fees pursuant to § 2412(d) of the EAJA, as well as attorney's
17 fees pursuant to the bad faith exception in § 2412(b) due to Defendant's "Motion to Alter the
18 Judgment." *Id.* Defendant objects to the Motion for Fees, contending Defendant's position in the
19 underlying case was substantially justified and Defendant did not act in bad faith. Dkt. 19.

20 The Court concludes Defendant's position was not substantially justified. Further, the
21 Court finds the Motion to Alter the Judgment resulted in an inefficient use of judicial resources.
22 However, the record does not reflect Defendant filed the Motion to Alter the Judgment in bad faith.
23 Therefore, Plaintiff's Motion for Fees (Dkt. 18) is granted-in-part.
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On February 15, 2018, Defendant filed a “Motion to Alter the Judgment” pursuant to Federal Rule of Civil Procedure 59(e). Dkt. 15. Plaintiff filed a Response opposing the Motion to Alter the Judgment on February 16, 2018. Dkt. 16. On March 27, 2018, the Court denied the Motion to Alter the Judgment. Dkt. 17.

DISCUSSION

requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) (citations omitted). The Court has an independent duty to review the submitted itemized log of hours to determine the reasonableness of hours requested in each case. *See Hensley*, 461 U.S. at 433, 436-37.

I. Defendant’s Position and Conduct

The parties dispute whether Defendant’s position in the underlying case was substantially justified. *See* Dkt. 18, pp. 4-5; Dkt. 19, pp. 1-3. The parties also dispute whether Defendant filed the Motion to Alter the Judgment in bad faith. *See* Dkt. 18, pp. 5-10; Dkt. 19, pp. 3-5.

A. Substantial Justification

In this matter, Plaintiff was the prevailing party because she received a remand to the Administration for further consideration. *See* Dkt. 13, 14. To award attorney’s fees to a prevailing plaintiff, the EAJA also requires a finding that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(B).

The Supreme Court has held “substantially justified” means “‘justified in substance or in the main’ – that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). A “substantially justified position must have a reasonable basis both in law and fact.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001) (citing *Pierce*, 487 U.S. at 565; *Flores*, 49 F.3d at 569). The Court “‘must focus on two questions: first, whether the government was substantially justified in taking its original action; and second, whether the government was substantially justified in defending the validity of the action in court.’” *Id.* at 1259 (quoting *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)). Thus, for the government to prevail, it must establish both the ALJ’s underlying conduct and its litigation

1 position in defending the ALJ's error were substantially justified. *Id.* "[I]f 'the government's
2 underlying position was not substantially justified,'" the Court must award fees and does not have
3 to address whether the government's litigation position was justified. *Tobeler v. Colvin*, 749 F.3d
4 830, 832 (9th Cir. 2014) (quoting *Meier v. Colvin*, 727 F.3d 867, 872 (9th Cir. 2013)). The fact the
5 Administration did not prevail on the merits does not compel the Court to conclude its position was
6 not substantially justified. *See Kali*, 854 F.2d at 334.

7 In this case, the Court found acceptable medical sources diagnosed Plaintiff with migraines,
8 and Plaintiff's migraines cause functional limitations which have more than minimal impacts on
9 her ability to work. Dkt. 13, pp. 3-4. The ALJ failed to consider the migraine diagnoses at Step
10 Two, and further failed to consider the limitations associated with Plaintiff's migraines when
11 assessing the RFC and the remaining steps of the sequential evaluation process. *Id.* at 3-6.

12 Therefore, the Court determined the ALJ committed harmful error. *Id.*

13 Defendant argues her position in the underlying matter was substantially justified because
14 the ALJ decided Step Two in Plaintiff's favor, and thus, any error at Step Two was harmless. Dkt.
15 19, pp. 2-3 (citing *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th Cir. 2017)). Defendant's
16 argument is unpersuasive. Regardless of the fact that the ALJ decided Step Two in Plaintiff's
17 favor, the ALJ was required to consider limitations imposed by *all* of Plaintiff's impairments,
18 severe or not, when assessing Plaintiff's RFC. *See Buck*, 869 F.3d at 1049 (citing Social Security
19 Rule ("SSR") 96-8p, 1996 WL 374184, at *5). Here, as the Court explained in its Order, the ALJ
20 failed to discuss Plaintiff's migraines and the associated limitations *throughout* the evaluation
21 process, such as in the RFC or hypothetical questions posed to the vocational expert ("VE"). Dkt.
22 13, pp. 5-6. Because the ALJ failed to consider the limitations imposed by Plaintiff's migraines,
23 the RFC was "incomplete, flawed, and not supported by substantial evidence." *See Hill v. Astrue*,

698 F.3d 1153, 1161 (9th Cir. 2012) (internal quotation marks and citations omitted); *see also* *Loader v. Berryhill*, --- Fed. Appx. ----, 2018 WL 524760, at *1 (9th Cir. 2018) (citing *Buck*, 869 F.3d at 1049) (finding that, even if the ALJ’s failure to find Plaintiff’s depression “severe” at Step Two was harmless error, the ALJ’s failure to consider Plaintiff’s depression when assessing the RFC and examining the VE was not harmless error).

Hence, the ALJ’s failure to consider the limitations associated with Plaintiff’s migraines was not substantially justified. *See Meier*, 727 F.3d at 872 (there is a strong indication the government’s position was not substantially justified when the agency’s decision is unsupported by substantial evidence); *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998) (“the defense of basic and fundamental errors . . . is difficult to justify”); *see also Tobeler*, 749 F.3d at 834 (emphasis in original) (“Because the government’s *underlying* position was not substantially justified, we award fees, even if the government’s *litigation* position may have been justified.”). Plaintiff is therefore entitled to attorney’s fees.

B. *Bad Faith*

Plaintiff next contends Defendant filed the Motion to Alter the Judgment in bad faith and as such, Plaintiff is entitled to market rate attorney’s fees for the time spent opposing that motion. Dkt. 18, pp. 5-10; *see also* 28 U.S.C. § 2412(b).

In addition to allowing a prevailing party to recover attorney’s fees at a statutory rate, the EAJA provides “[t]he United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law.” 28 U.S.C. § 2812(b). The incorporation of the common law into the EAJA “has been used to allow awards of attorney fees at market rates in cases involving ‘bad faith’ by the United States or an agency of the United States.” *Brown v. Sullivan*, 916 F.2d 492, 495 (9th Cir. 1990) (quoting *Barry v. Bowen*, 825 F.2d 1324,

1 1333 (9th Cir. 1987)). Awarding attorney fees “under the bad faith exception is punitive, and the
2 penalty can be imposed only in exceptional cases and for dominating reasons of justice.” *Id.*
3 (internal quotation marks and citations omitted). Hence, the bad faith exception is “narrow” and
4 typically warranted only in cases of “vexatious, wanton, or oppressive conduct.” *Id.* (citing *Barry*,
5 825 F.2d at 1334).

6 In this case, the Step Two arguments Defendant presented in the Motion to Alter the
7 Judgment reflected the same arguments presented in the Response. *Compare* Dkt. 11, pp. 2-3
8 (Response) *with* Dkt. 15, pp. 2-3 (Motion to Alter the Judgment). As such, Plaintiff asserts
9 Defendant filed the Motion to Alter the Judgment in bad faith and she is entitled to market rate
10 attorney’s fees for the time spent opposing that motion. Dkt. 18, pp. 7-8. Defendant, on the other
11 hand, maintains she did not file the Motion to Alter the Judgment in bad faith, but rather filed it as
12 “a good-faith attempt to call the Court’s attention to a legitimate authority and its application to the
13 facts of this case.” Dkt. 19, pp. 3-4.

14 The Court is well-aware of all arguments presented to it and did not need Defendant to
15 reiterate the arguments already presented in the Response. The Court is also well-aware of the case
16 law and other authorities regarding Step Two of the sequential evaluation process. Given that the
17 Court did not commit any error in its initial Order, and that the arguments within the Motion to
18 Alter the Judgment were not new and did not submit any new authority, the time the Court
19 expended denying the Motion to Alter the Judgment resulted in an inefficient use of judicial
20 resources. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (emphasis added) (internal
21 quotation marks and citation omitted) (noting that a Motion to Alter or Amend the Judgment is an
22 “extraordinary remedy, *to be used sparingly* in the interests of finality and *conservation of judicial*
23 *resources*”).

1 Nonetheless, while Defendant’s decision to file the Motion to Alter Judgment was
2 inefficient and unmeritorious, the record does not reflect Defendant’s filing of the Motion to Alter
3 the Judgment was the “exceptional case” in which bad faith was present. *See Rodriguez v. United*
4 *States*, 542 704, 711 (9th Cir. 2008) (internal quotation marks and citation omitted). Instead, the
5 record reflects Defendant filed the Motion to Alter the Judgment based on a genuine – albeit
6 misplaced – belief in the motion’s merits. *See Castillo v. Colvin*, 2016 WL 5680162, at *5 (N.D.
7 Cal. Oct. 3, 2016) (declining to award bad faith attorney’s fees where the Administration filed a
8 Motion to Alter the Judgment due to a “genuine but misplaced belief” in the motion’s merit); *see*
9 *also United States v. Manchester Farming P’ship*, 315 F.3d 1176, 1182 (9th Cir. 2003) (vexatious
10 conduct requires proof of “ill intent” to act maliciously or harass); *Brown*, 916 F.2d at 495 (noting
11 that conduct may be “unreasonabl[e]” but fall short of the bad faith standard). Thus, the Court
12 denies Plaintiff’s request for bad faith attorney’s fees.

13 C. *Plaintiff is Entitled to Award*

14 In sum, the Administration has not shown substantial justification for the ALJ’s underlying
15 decision. There are also no special circumstances which render an EAJA award in this matter
16 unjust. Accordingly, while the Court denies Plaintiff’s request for bad faith attorney’s fees, the
17 Court finds Plaintiff is entitled to attorney’s fees at the EAJA statutory rate. *See Meier*, 727 F.3d at
18 872; *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007) (“[W]e have consistently held that regardless
19 of the government’s conduct in the federal court proceedings, unreasonable agency action at any
20 level entitles the litigant to EAJA fees.”).

21 **II. Reasonableness of Fee**

22 Once the Court determines a plaintiff is entitled to a reasonable fee, “the amount of the fee,
23 of course, must be determined on the facts of each case.” *Hensley*, 461 U.S. at 429, 433 n.7. Here,
24

1 Defendant does not challenge the reasonableness of the fee. *See* Dkt. 19. Moreover, based on the
2 circumstances of this matter, briefing, declarations, and attorney time sheet, the Court concludes
3 the amount of time incurred by Plaintiff's attorney in this matter is reasonable. *See* Dkt. 18.
4 Specifically, the Court finds Plaintiff's request for \$5,252.65 in attorney's fees (representing 26.7
5 hours of attorney work) reasonable.¹ *See id.*

6 CONCLUSION

7 For the above stated reasons, the Court hereby grants Plaintiff's Motion as follows:

8 Plaintiff is awarded a total award of \$5,252.65 in attorney's fees, representing 26.7 hours of
9 attorney work, pursuant to the EAJA and consistent with *Astrue v. Ratliff*, 560 U.S. 586 (2010).

10 The Acting Commissioner shall contact the Department of Treasury to determine if the
11 EAJA Award is subject to any offset. If the U.S. Department of the Treasury verifies to the Office
12 of General Counsel that Plaintiff does not owe a debt, the government shall honor Plaintiff's
13 assignment of EAJA Award and pay the EAJA Award directly to Dellert Baird Law Offices,
14 PLLC, Plaintiff's counsel. If there is an offset, any remainder shall be made payable to Plaintiff,
15 based on the Department of the Treasury's Offset Program and standard practices, and the check
16 shall be mailed to Plaintiff's counsel, Dellert Baird Law Offices, PLLC, 2805 W Bridgeport Way,
17 #23, University Place, WA 98466.

18 Dated this 22nd day of May, 2018.

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20 David W. Christel
21 United States Magistrate Judge

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23 ¹ Although Plaintiff requests an attorney's fee award pursuant to the EAJA statutory rate for 2017, her
24 attorney spent some time on this case in 2016. *See* Dkt. 18-2. Therefore, the Court applies the 2016 statutory rate to
the time Plaintiff's attorney spent during that year. *See* 28 U.S.C. § 2412(d)(2)(A); *Thangaraja v. Gonzales*, 428
F.3d 870, 876-77 (9th Cir. 2005).